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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

HENRY HERNANDEZ et al.,	
Plaintiffs and Appellants,	E047081
v.	(Super.Ct.No. CIVRS701608)
DANILO D. MAGAT,	OPINION
Defendant and Respondent.	

APPEAL from the Superior Court of San Bernardino County. Barry L. Plotkin, Judge. Reversed.

The Law Offices of Catherine M. Brame, Catherine M. Brame; D. Scott Mohney for Plaintiffs and Appellants.

Tharpe & Howell, Christopher S. Maile and Stacey A. Miller for Defendant and Respondent.

Plaintiffs and appellants Henry and Fatima Hernandez appeal after the trial court sustained the demurrer of defendant and respondent Danilo D. Magat to plaintiffs' second amended complaint for breach of contract, fraud and other causes of action, arising out of

an alleged failure to procure insurance on a home they had purchased. The appeal is from a judgment of dismissal after sustaining the demurrer without leave to amend. We reverse.

FACTS AND PROCEDURAL HISTORY

Because the matter arises on demurrer, we take as true all the well-pleaded factual allegations of the operative complaint. (*Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 495.)

In early 2005, plaintiffs were purchasing a home in Ontario. Defendant Roman Realty Escrow (the escrow company) was responsible for handling the escrow and for the closing of the transaction. Plaintiffs had a long-standing relationship with their own homeowners insurance carrier, but the escrow company told plaintiffs that their carrier would be unable to provide coverage for the new home in time for the escrow closing. The escrow company recommended using defendant Carmen Lopez Insurance. The escrow company gave a check to Carmen Lopez Insurance for an insurance policy on the home on behalf of plaintiffs, and obtained an "evidence of property insurance" statement setting forth the name of the insurer (Farmers Insurance), the policy number, and the amount of the annual premium. Plaintiffs paid for an entire year's premiums in advance. The policy period was stated to be from February 2005 to February 2006.

In July 2005, plaintiffs experienced a sewage backup that flooded the house. Plaintiffs called Farmers, and a Farmers employee authorized plaintiffs to arrange immediately for cleanup work. A Farmers claim representative came to plaintiffs' home and advised them that they could not stay in the home, as the raw sewage had

contaminated the premises and rendered it uninhabitable. The Farmers claim representative also promised to pay the cleanup company directly. The claim representative told plaintiffs to discard all their personal property that had been contaminated by the sewage, and paid for plaintiffs to stay in a hotel pending cleanup and renovation of the home.

After three days, however, Farmers informed plaintiffs that plaintiffs had no policy of insurance with Farmers. Plaintiffs would either have to move back into the contaminated and damaged home, or personally bear the cost of staying elsewhere. The loss of plaintiffs' personal property, which they had thrown away on the advice of the Farmers claim representative, was also not covered by insurance. Farmers halted the cleanup effort, taking its hired crew off the job.

Plaintiffs, who had no money to pay for a place to stay out of the home, had to move back into the contaminated house. They had no money to replace ruined furniture, and slept on the floor. Plaintiffs' children were injured by sewage-infected nail heads that remained in the floors after the removal of the flooring.

On further review, Farmers discovered that there was evidence that plaintiffs did have a policy of insurance with Farmers. Plaintiffs alleged that the policy procured through Carmen Lopez Insurance was a special insurance policy which could only be obtained from a Farmers agent authorized to sell only Farmers insurance products; defendant and respondent Danilo D. Magat was such an authorized Farmers agent, and Carmen Lopez Insurance had sold plaintiffs the Farmers insurance policy through Magat.

Plaintiffs suffered medical conditions as a result of exposure to the contaminated home, and they were also treated for depression and anxiety.

At some point after attorneys became involved, defendant Magat went into the Farmers computer systems and generated another policy and policy number for plaintiffs. Magat sent the policy and face page to plaintiffs; new billing statements were issued based on the new policy number, indicating that plaintiffs owed moneys for unpaid policy premiums, despite plaintiffs having paid for an entire year of coverage when their first policy began.

Farmers, having determined in September of 2005 that the initial policy was valid, assisted plaintiffs in moving from the home into temporary housing while repairs were effected. However, based on the new policy information, Farmers began a collection action against plaintiffs for allegedly unpaid premiums.

In October 2005, Farmers refused to pay for the cleanup work; plaintiffs received notice that the cleanup contractor was starting foreclosure proceedings on a contractor's lien. Farmers still refused to pay, and the contractor proceeded against plaintiffs. In addition, although plaintiffs' home was contaminated with mold after the flooding, Farmers refused coverage, claiming that the mold condition was preexisting. Plaintiffs had to pay for mold abatement, even though the sewage flooding, and the delay in cleanup, caused the mold problem.

On the basis of these allegations, plaintiffs sued for breach of contract against the escrow company (first cause of action), against Carmen Lopez Insurance and Magat (second cause of action), and against Farmers (third cause of action). Plaintiffs alleged

bad faith against Carmen Lopez Insurance and Magat (fourth cause of action) and Farmers (fifth cause of action). The sixth cause of action, against the escrow company, was for breach of implied warranty. Plaintiffs alleged conspiracy to commit fraud against the escrow company, Carmen Lopez Insurance, and Magat, and fraud against all defendants (seventh & eighth causes of action). The second amended complaint also included causes of action for negligent misrepresentation (inducement to purchase) against the escrow company, Carmen Lopez Insurance and Magat (ninth cause of action), and against Farmers (inducement to destroy personal belongings) (tenth cause of action). Finally, plaintiffs alleged a cause of action for intentional infliction of emotional distress against all defendants (eleventh cause of action) for the loss of their home, a second claim of intentional infliction of emotional distress against Farmers and Magat (thirteenth cause of action) based on the premiums collection activities and threats to destroy plaintiffs' credit, and a cause of action for negligent infliction of emotional distress against all defendants (twelfth cause of action).

With respect to Magat specifically, the second cause of action alleged that Magat had breached an agreement to obtain the promised policy of homeowners insurance on the home. The fourth cause of action alleged that the same failure to obtain insurance breached the covenant of good faith and fair dealing. Defendant Magat allegedly failed to properly process plaintiffs' premium payments, and misrepresented the facts to plaintiffs—including issuing a later policy, to cover over Magat's earlier mistakes.

The seventh cause of action alleged a conspiracy to commit fraud, under which the escrow company, Carmen Lopez Insurance, and Magat would "sell" insurance policies to

customers, all the while knowing that the insurance policies were not actually being procured. The conspirators issued a policy number and documents to plaintiffs, but in fact no insurance was purchased and the premiums were simply stolen. The eighth cause of action, for fraud, was similar. Magat, as a "captive" insurance agent for Farmers, was entitled to sell more exclusive insurance products that were not available to or from independent agents. Magat (and Farmers) received plaintiffs' payment for one year of premiums, and represented that Farmers had supplied an insurance policy for plaintiffs' home, but in fact no insurance policy was issued. If the coverage that plaintiffs paid for had been issued, their loss would have been a covered loss. Defendant Magat fraudulently issued a subsequent policy to plaintiffs (and to Farmers) to conceal the misappropriation of the original premiums. The ninth cause of action, for negligent misrepresentation, was in the same tenor, alleging that plaintiffs had been misinformed that insurance had been procured, when in fact no policy was issued.

The eleventh cause of action, for intentional infliction of emotional distress for the loss of plaintiffs' home, asserted that the defendants knew or should have known that the failure to procure proper insurance coverage would, after a catastrophic loss, cause severe emotional distress (and physical illness) to plaintiffs. The twelfth cause of action, for negligent infliction of emotional distress, was to the same effect: breach of a duty of care to procure the insurance foreseeably resulted in severe emotional distress.

The thirteenth cause of action, another cause of action for intentional infliction of emotional distress, was based on the creation of the subsequent policy. Plaintiffs had prepaid for the original policy; however, that policy was never issued. Magat created a

new policy, which generated demands for premium payments. Magat and Farmers made collection demands for the premiums for the subsequent policy, and threatened to ruin plaintiffs' credit if they did not pay, even though plaintiffs had already paid for a year of insurance coverage. These wrongful demands and threats caused plaintiffs severe emotional distress.

Defendant Magat demurred to the second amended complaint. Magat argued that the second cause of action (breach of contract) was insufficient because Magat, an insurance agent, was not a party to the insurance contract. Magat also argued that the remaining causes of action against him were deficient in various particulars. Because of a calendaring error, plaintiffs' counsel failed to file an opposition to the demurrer. An associate attorney appeared at the hearing on the demurrer, which the trial court sustained without leave to amend as to all the causes of action against Magat. The court ordered the action dismissed as to defendant Magat, with prejudice.

A few days after the hearing, plaintiffs' counsel moved for reconsideration, and attached a proposed response to defendant Magat's demurrer. Counsel averred that she had been in Washington, D.C. on the date of the hearing, and a calendaring error had led to the failure to file a response to the demurrer. The proposed opposition pointed out, as to the second cause of action, that the gist of the cause of action was not breach of the insurance contract by Magat, but breach of a different agreement, an agreement to procure insurance. Magat opposed the motion for reconsideration, and the trial court denied the motion. The court entered judgment of dismissal in favor of Magat. Plaintiffs filed a timely notice of appeal.

ANALYSIS

I. Standard of Review

A demurrer tests whether the pleadings fail to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).) "On appeal from dismissal following a sustained demurrer, we take as true all well-pleaded factual allegations of the complaint." (*Haggis v. City of Los Angeles*, *supra*, 22 Cal.4th at p. 495.) We do not, however, "'assume the truth of the contentions, deductions or conclusions of law.'" (*Washington v. County of Contra Costa* (1995) 38 Cal.App.4th 890, 895.) Rather, we exercise our independent judgment to determine whether the pleading states a cause of action as a matter of law. (*City of Morgan Hill v. Bay Area Air Quality Management Dist.* (2004) 118 Cal.App.4th 861, 869-870.)

When the trial court sustains a demurrer without leave to amend, we determine whether the trial court abused its discretion in denying leave to amend. (*Cantu v. Resolution Trust Corp*. (1992) 4 Cal.App.4th 857, 879.) A trial court abuses its discretion if "there is a reasonable possibility the plaintiff could cure the defect with an amendment." (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) As to either issue on review, the appealing party has the burden of demonstrating error. (*Cantu v. Resolution Trust Corp*., *supra*, 4 Cal.App.4th at p. 879.)

II. The Trial Court Erred in Sustaining the Demurrer

Plaintiffs' appeal deals solely with the second cause of action, for breach of contract against defendant Magat. They do not contest the sustaining of the demurrer as to any of the other causes of action.

Magat had demurred to the second cause of action, for breach of contract, on the ground that Magat was an insurance agent, and not the insurer; thus, Magat could not, as a matter of law, be liable for any breach of the insurance contract. Magat relied on *Minnesota Mut. Life Ins. Co. v. Ensley* (9th Cir. 1999) 174 F.3d 977, 981 (*Minnesota Mutual*), for the proposition that an insurance agent or broker cannot be liable for breach of an insurance contract, because the agent or broker is not a party to the insurance contract. (*Ibid*.)

As plaintiffs pointed out in their motion for reconsideration, however, *Minnesota Mutual* is inapplicable. The gravamen of plaintiffs' cause of action for breach of contract against Magat was not the breach of the insurance contract (i.e., the failure of the insurer to provide the contracted-for coverage) but a different agreement—an agreement to *procure* insurance.

Plaintiffs urge that, despite the inadvertence of their counsel in failing to file a written opposition to the demurrer, the trial court was nevertheless obligated to determine whether the second amended complaint, as it stood, was sufficient to state a cause of action. Plaintiffs contend that, inasmuch as the gist of their claim against Magat was not the breach of the insurance contract itself, but the breach of an independent agreement to procure insurance, it should have been clear upon the face of the pleading that the basis for Magat's demurrer was inapplicable.

In the respondent's brief, Magat repeats his position taken below, that he, as an insurance agent, was not a party to the insurance contract, and cannot be liable for breach of the insurance contract. He again cites *Minnesota Mutual* for that principle. Magat

further states that "[t]he only contract alleged in the [second amended complaint] is the insurance contract between the Insurer and [plaintiffs]." This is simply untrue; plaintiffs clearly alleged a different contract, a contract to procure insurance, in the second cause of action.

The second cause of action alleges that defendants Magat and Carmen Lopez Insurance "entered into an agreement where Defendants . . . undertook a duty to obtain insurance to complete the transaction for the purchase of [the home]." Further, plaintiffs' second amended complaint alleges that defendants Magat and Carmen Lopez Insurance "represented that a policy of insurance had been procured on behalf of Plaintiffs in compliance with the terms of the escrow contract . . . as reflected in the 'Evidence of Property Insurance' . . . signed by Defendants or their agents," and giving a policy number and effective dates for the purported policy. Plaintiffs directly allege that defendants Magat and Carmen Lopez Insurance "breached their agreement in that Defendants did not provide the homeowners insurance as represented, despite Plaintiffs' payment of a full year's premiums for the insurance."

Defendant Magat acknowledges that the second amended complaint alleges "that there was an 'agreement to undertake a duty' to procure insurance with MAGAT and [Carmen] Lopez [Insurance]," but scoffs, "whatever that may mean." Magat further baldly asserts that "[s]uch an allegation cannot support a claim for breach of a contract to procure insurance . . . ." Although the allegation might be better phrased, the essence of the second cause of action is not that Magat is liable for Farmers' breach of the insurance

contract itself, but that Magat is liable for breach of a separate agreement to *procure* insurance.

Under the rubric of whether the trial court abused its discretion in denying leave to amend the complaint, Magat asserts that, even if the facial factual allegations of the second cause of action are sufficient to allege a breach of contract to obtain insurance, other facts alleged in the second amended complaint contradict such a claim. A demurrer admits the factual allegations of a pleading, and matters which may be judicially noticed, but not contentions, deductions or conclusions of fact or law. (*Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 814; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Magat evidently asserts that some of the allegations of the complaint amount to no more than inferences, rather than actual facts.

Thus, Magat points to the general allegations of the second amended complaint, that the escrow company recommended dealing with Carmen Lopez Insurance and that Carmen Lopez Insurance sold an insurance policy from Farmers to plaintiffs. In addition, the exhibits attached to the complaint included (1) the "Evidence of Property Insurance" document which listed Carmen Lopez Insurance as the "producer" of the insurance policy, and (2) the check from the escrow company to Carmen Lopez Insurance, which was endorsed by Carmen Lopez Insurance. Magat contends that the exhibits take precedence over any contradictory allegations in the pleading (*SC Manufactured Homes, Inc. v. Liebert* (2008) 162 Cal.App.4th 68, 83), and that the documents (showing that Carmen Lopez Insurance received the premium payment and purportedly procured the

policy from Farmers) contradict any factual allegation that there was an agreement with Magat to procure insurance.

There is, however, no necessary contradiction between the documents and the general allegations of the complaint, on the one hand, and an agreement by Magat to procure insurance, on the other. The allegations of the pleading explain that the kind of insurance policy Carmen Lopez Insurance supposedly obtained from Farmers was the kind of policy that could be issued only by an agent, such as Magat, who exclusively sold Farmers insurance products. Carmen Lopez Insurance could fulfill its duty to procure the policy required by, as plaintiffs' agent, contracting with and paying Magat to supply the policy it deemed necessary to fulfill plaintiffs' needs. That such an additional transaction does not appear on the escrow insurance documents does not inherently contradict the truth of the allegation that Carmen Lopez Insurance in fact obtained the insurance from defendant Magat. In addition, the contractual duty owed to Carmen Lopez Insurance, plaintiffs' agent, was also a duty to plaintiffs. (Cf. *Mendoza v. Continental Sales Co.* (2006) 140 Cal.App.4th 1395, 1405 [subagent owes the same duties to a principal as does the agent].)

Magat also urges that the face of the pleading shows it had an absolute defense to the breach of contract claim, and that the demurrer therefore was properly sustained, or that the court did not abuse its discretion in denying leave to amend. Magat asserts that, because the second amended complaint alleges the February insurance policy was issued, and should have been enforceable and valid at all times, Magat could not have breached a contractual agreement to procure such a validly issued policy. Magat also states that

Farmers ultimately provided coverage under the same policy number as the February policy, and thus it cannot have breached any agreement to provide insurance.

Magat ignores the "modern practice" that, "[w]hen a pleader is in doubt about what actually occurred or what can be established by the evidence . . ." the party may "plead in the alternative and make inconsistent allegations. [Citations.]" (*Mendoza v. Continental Sales Co.*, *supra*, 140 Cal.App.4th at p. 1402.) Plaintiffs' position below was alternative: either the policy purportedly procured in February had not been procured as promised, or it had been procured, but Farmers improperly denied coverage. While the second possible alternative is consistent with Magat's defense that he fulfilled the contract to procure insurance, at the demurrer stage, alternative pleading is permissible, and the first factual alternative does not demonstrate an absolute defense as a matter of law.

It remains to be seen what specific factual matters may be developed through discovery, but at the pleading stage, plaintiffs' second cause of action in the second amended complaint was sufficient to state a claim for breach of contract against defendant Magat. The trial court therefore erred in sustaining the demurrer to that cause of action. The judgment of dismissal must therefore be reversed, and the second cause of action (the only one appealed from) on the second amended complaint is reinstated against defendant Magat.

DISPOSITION

The allegations of plaintiffs' second amended complaint were sufficient to state a cause of action against defendant Magat for breach of an agreement to procure insurance.

The trial court erred in sustaining the demurrer to that cause of action (the only ruling appealed from), and the judgment of dismissal against Magat is reversed. Appellants are awarded their costs on appeal.

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/s/ McKINSTER
Acting P. J.

We concur:

/s/ KING
J.

/s/ MILLER
J.